

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Regarding the Fax Ban Coalition Petition)	
For Declaratory Ruling)	
)	

**COMMENTS OF THE MORTGAGE BANKERS ASSOCIATION IN SUPPORT
OF THE FAX BAN COALITION PETITION FOR DECLARATORY RULING**

The Mortgage Bankers Association (MBA)¹ appreciates the opportunity to comment on the Federal Communications Commission's (the Commission) request for comments in connection with the Fax Ban Coalition's (the Coalition) petition for declaratory ruling concerning the Commission's jurisdiction over interstate communications under the Telephone Consumer Protection Act of 1991 (TCPA). MBA is a member of the Coalition and signed the Petition.

MBA believes that the Commission should exert its exclusive authority to regulate interstate fax solicitations and, therefore, preempt state laws that conflict with the TCPA and the Junk Fax Prevention Act of 2005 (JFPA).

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 500,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the Nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,900 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

Background

On July 9, 2005, the Junk Fax Prevention Act was enacted. The Act codified the established business relationship (“EBR”) exemption to the general prohibition on faxing unsolicited advertisements pursuant to the TPCA. The JFPA offered much needed relief for businesses that use faxes to communicate a wide variety of information to business partners and clients.

This federal legislation was critical in light of the Commission’s 2003 ruling that eliminated the established business relationship exemption and, instead, required businesses to obtain the recipient’s prior express written consent to send an unsolicited fax advertisement. The 2003 ruling caused a significant problem for mortgage companies and other businesses because the rule applied not only to business-to-consumer faxing, but also to business-to-business faxing. The broad definition of an advertisement encompassed many transactional communications between business partners and threatened day-to-day operations.

We applaud the Commission for postponing the application of the rule to consider various Petitions for Reconsideration and to grant Congress time to act accordingly. With the passage of the JFPA, Congress clearly recognized the serious economic burden of requiring express written consent prior to faxing an unsolicited advertisement and finally resolved the concern by statutorily creating the established business relationship exemption.²

Unfortunately, on October 7, 2005, California enacted a law that prohibits any person from sending an unsolicited advertisement via fax into or out of the

² Statement of Sen. Smith (for himself and others), Cong. Rec. S.3280 (April 6, 2005).

state without the “prior express invitation or permission” of the recipient. The state law failed to adopt the established business relationship exemption provided by the JFPA.³

Because California is the largest real estate market, the impact of this new law on interstate transactions will be profound, effectively supplanting the JFPA as the governing law. As the Fax Ban Coalition’s Petition points out, thirty-one other states have also enacted laws, some of which conflict with the JFPA by controlling “the format of interstate faxes, the content of those faxes, handling of opt-out requests for fax transmissions sent from an out-of-state business, and whether or not certain interstate faxes can be sent at all.”⁴ The Commission should not permit states to frustrate the purpose of the JFPA nor should the Commission allow one state to impose its laws on other states, as the California law would certainly do.

The fact that the JFPA does not specifically preempt *interstate* faxes should not deter the Commission from preempting the numerous state laws that regulate interstate facsimile transmissions. As the Fax Ban Coalition points out, Congress did not need to expressly address state authority in the JFPA because states lack jurisdiction to regulate interstate communication. The Communications Act of 1934 granted the Commission exclusive jurisdiction over regulating interstate and international telecommunications (47 U.S.C. § 152). As a member of the Coalition, MBA will not reiterate the legal analysis provided in the Coalition’s Petition, though we certainly echo and support those views.

³ Section 17538.43 of the California Business and Professions Code.

⁴ Fax Ban Coalition Pet. For Decl. Ruling, filed November 7, 2005, page 5, 6 and App. C.

Mortgage Industry Use of Faxes

Mortgage companies rely heavily on facsimiles to communicate with their business partners, including mortgage brokers, loan correspondents, real estate brokers, home builders, insurance companies, and other providers of real estate services. The most common business-to-business fax is the “rate sheet.” The rate sheet lists prices at which wholesale lenders will purchase loans from originators. These rate sheets set the interest rates consumers receive on their mortgages and, thus, are critical to ensure that borrowers get the best rate on their mortgages and that originators do not incur unnecessary interest rate risk.

Faxes are also used to initiate and complete mortgage transactions with consumers through the transmission of loan applications, rate lock agreements, product characteristics, and similar transaction-specific information. Any federal or state statute that restricts or delays the flow of critical information of this nature is problematic and serves to harm the consumer. We believe California’s newly enacted law is one such statute.

Impact of a Patchwork of State Laws

One of our industry’s primary concerns is the ability to comply with any law without incurring unrealistic compliance costs and statutory penalties. MBA members are legitimate businesses that make every effort and incur considerable costs to comply with the TCPA and other federal and state laws. But, some measure of control is necessary in this case.

Consider, for example, the difficulty of some of the larger lenders, both inside and outside of California, to control fax communications deemed to be

“unsolicited advertisements” under the new California law. With more than 5,500 employees,⁵ over 1.5 million homeowner clients⁶ and thousands of third party originators and vendors, these large entities send out thousands of “rate sheets” (and other business communications) by fax daily. If the California law is not preempted, the cost and burden of evidencing permissions to fax what is a common, standard, and desired document (the rate sheet) would be staggering to our industry. The expenses associated with the California law do not stop there, however, as companies would have to dedicate staff and technology to keep “permissions” up-to-date, scrub their fax lists, and distribute scrubbed lists to employees on a “real time” basis—due to the time sensitive nature of the rate sheet and other client based information. The ability to control thousands of staff, each with legitimate reasons for faxing existing relationships is incomprehensible.

Over time, some companies could adjust their business models to reduce or eliminate fax communications altogether as state laws prove problematic. However, such a shift would not be desirable. Moving from fax to electronic communications, for example, would inevitably take time and leave businesses exposed in the interim. Abandoning faxing as a communication method would also reduce individual preferences and likely have a significant impact on smaller companies that tend to favor fax communications. Reducing fax capability or restricting fax use will also hamper the timely exchange of handwritten

⁵ MBA/STRATMORE “Peer Group Survey for Megalenders,” ending June 30, 2005.

⁶ MBA’s “Cost of Servicing Study,” 2005.

documents and documents that are not available in electronic form. When a consumer's home purchase or interest rate is on the line, it is not acceptable to impose even modest delays. The stakes are much too high.

The JFPA creates a uniform set of rules for fax communications without overburdening businesses. The fact that the JFPA incorporates an opt-out provision for fax recipients provides the right balance between consumer privacy and business necessity. Allowing California and other states to adopt more restrictive rules on interstate faxing eliminates the benefits of the federal legislation outright and creates a chaotic scheme of compliance requirements.

If the Commission does not act to exert its jurisdiction over interstate fax communications to the exclusion of the states, other states will be free to adopt similar restrictions--as we have already witnessed. A patchwork of 50 state laws makes it literally impossible for companies to comply fully or consistently. Taken to its logical extreme, state laws that extend beyond the state's borders could subject companies to two diametrically opposed laws for the same fax solicitation—one law supporting an EBR and one prohibiting it, for example. The Commission should not accept a regulatory regime that is so disjointed that large-scale unintentional mistakes occur and that compliance becomes a guessing game.

The sizable civil penalty associated with California's law coupled with the "express invitation or permission" requirement imposes significant liability for the most innocuous acts of non-compliance. As the California trend takes hold--a situation that will most certainly occur -- more states will likely adopt identical or

similar statutory penalties – causing growing exposure for mortgage companies and other businesses.

In Summary

The business community is already struggling with the current federal and intrastate scheme that places considerable demands on fax communications. Allowing states to impose more stringent prohibitions on faxing unsolicited advertisements across state lines than the federal law provides will result in a regulatory abyss for businesses. MBA respectfully urges the Commission to grant the declaratory relief requested by the Coalition's petition.

Respectfully submitted,

A handwritten signature in black ink, reading "Jonathan L. Kempner". The signature is fluid and cursive, with the first name "Jonathan" being more prominent than the last name "Kempner".

Jonathan L. Kempner
President and Chief Executive Officer
Mortgage Bankers Association
1919 Pennsylvania Ave, NW
Washington, DC 20006
(202)557-2700

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